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# The Age of the Human Billboard: Endorsement Disclosures in New Millennia Media Marketing

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## The Age of the Human Billboard: Endorsement Disclosures in New Millennial Media Marketing

### I. INTRODUCTION

SINCE ITS INCEPTION IN 1914, the Federal Trade Commission (“FTC”) has enforced the law of unfair advertising to protect consumers from unjust business practices.<sup>1</sup> Through Section V of the FTC Act, the FTC has adopted rules and defined unfair trade practices and misleading advertising.<sup>2</sup> With the expansion of new media, companies have begun utilizing consumers’ mobile-media-centered universe as an advertising tool.<sup>3</sup> Specifically, during the Internet age, the use of stealthy advertising practices by celebrities has become more prevalent.<sup>4</sup> However, this new media has created challenges in regulating advertising in the sphere of consumer protection.<sup>5</sup> As early as 2000, the FTC began issuing guides relevant to this new online media.<sup>6</sup> When the FTC released *Dot Com Disclosures*, it was attempting to narrow the gray area of how marketing and advertising would work on the Internet post-Y2K.<sup>7</sup> Technology has progressed since the FTC conducted the research to create the

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\* J.D., University of Maryland Francis King Carey School of Law, 2015; B.A. *magna cum laude*, Notre Dame de Namur University, 2011. The author would like to thank Professor James Grimmelmann, Professor Hilary Hansen, and the members of the *Journal of Business & Technology Law* for their advice and support in writing this comment. The author would like to dedicate this comment to her parents, John and Donna, and her brother, Brandon, for all of their unconditional love and support. Without it, she would not be where she is today. The author would also like to dedicate this comment to her family; especially her grandparents, William and Shirley Gibson and Jack and Mary Alice Byrne; and her aunt and uncle, Susan and Allen Dunlow, for always believing in her abilities and supporting her educational goals.

1. See 15 U.S.C. §§ 41–58 (2012); *infra* Part III.

2. See 15 U.S.C. §§ 41–58 (2012); *infra* Part III.

3. See *infra* Part II. See generally Leah W. Feinman, Note, *Celebrity Endorsements in Non-Traditional Advertising: How the FTC Regulations Fail to Keep Up with the Kardashians*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97 (2011).

4. See Feinman, *supra* note 3, at 110–13; *infra* Part II.

5. See Feinman, *supra* note 3, at 110–13; *infra* Part III.C.

6. FED. TRADE COMM’N, DOT COM DISCLOSURES: INFORMATION ABOUT ONLINE ADVERTISING (2000), available at <http://ftc.gov/os/2000/05/0005dotcomstaffreport.pdf> [hereinafter DOT COM DISCLOSURES].

7. Sara Hawkins, *What Marketers Need to Know About the New FTC Disclosures*, SOC. MEDIA EXAM’R (May 1, 2013), <http://www.socialmediaexaminer.com/ftc-2013-disclosures/>.

original guides in the late 1990s.<sup>8</sup> However, the face of online social media and celebrities' constant presence has continued to evolve over the past decade.<sup>9</sup> Businesses, in turn, have worked to keep pace with the online social media market to better reach their consumers.<sup>10</sup>

In response to these commercial business changes, the FTC provided new guidelines to advise businesses on appropriate online advertising practices and online endorsements.<sup>11</sup> However, these 2009 guidelines caused confusion over how and when to effectively make disclosures of endorsements and advertisements on social media sites.<sup>12</sup> In its March 2013 guide, *.com Disclosures*,<sup>13</sup> the FTC addressed some of the unique issues that arise through advertising on mobile devices and social media applications, and how businesses can modify their practices to comport with fair advertising.<sup>14</sup> While some businesses still questioned the exact standard for online advertisement disclosures, the industry began to self-regulate to conform to the FTC's 2013 guidance.<sup>15</sup> That self-regulation, combined with the FTC's recent notifications to numerous businesses that their current online disclosures fall short of the articulated standard<sup>16</sup> and the new enforcement actions regarding disclosures on social media,<sup>17</sup> has proven that the FTC is ahead of the constantly evolving conundrum that is the regulation of fair advertising in the online era.<sup>18</sup>

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8. See *id.* (noting that many consumers were still awaiting Windows XP, which came out in 2001, that there was no such thing as the iPhone (released in 2007), and MySpace was the standout face of social media in 2003).

9. Feinman, *supra* note 3, at 110–13; Hawkins, *supra* note 7.

10. See generally Feinman, *supra* note 3; Hawkins, *supra* note 7.

11. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. pt. 255 (2009).

12. See *infra* Part III.C; see also Feinman, *supra* note 3.

13. FED. TRADE COMM'N, *.COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING* (2013), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> [hereinafter *.COM DISCLOSURES*].

14. See *.COM DISCLOSURES*, *supra* note 13; *infra* Part IV.

15. See *infra* Part VII; see also Jack Marshall, "Native" Ad Labelling is a Work in Progress, CMO TODAY (May 29, 2014, 10:52 AM), <http://blogs.wsj.com/cmo/2014/05/29/debate-continues-around-native-ad-labelling/>.

16. See Press Release, Fed. Trade Comm'n, Operation 'Full Disclosure' Targets More Than 60 National Advertisers: FTC Initiative Aims to Improve Disclosures in Advertising (Sept. 23, 2014), <http://www.ftc.gov/news-events/press-releases/2014/09/operation-full-disclosure-targets-more-60-national-advertisers> [hereinafter FTC Press Release Operation 'Full Disclosure']; *infra* Part VI.A.

17. See Press Release, Fed. Trade Comm'n, Sony Computer Entertainment America To Provide Consumer Refunds To Settle FTC Charges Over Misleading Ads For PlayStation Vita Gaming Console: FTC Also Charges Los Angeles Ad Agency with Promoting Console through Deceptive Twitter Endorsements (Nov. 25, 2014), <http://www.ftc.gov/news-events/press-releases/2014/11/sony-computer-entertainment-america-provide-consumer-refunds> [hereinafter FTC Press Release Sony]; *infra* Part VI.B.

18. See *infra* Part VI.

This comment seeks to explain that the FTC effectively regulates advertising practices to ensure consumer protection online.<sup>19</sup> Part II explains how advances in technology and media have brought challenges to regulating advertising practices.<sup>20</sup> Despite the changing climate of advertising, however, the FTC has prudently taken strides to provide guidance to businesses and advertisers about how to comply with the FTC Act.<sup>21</sup> While some criticize the FTC's effectiveness, Parts III and IV assert that the FTC has continued to regulate advertising practices to protect consumers in this rapidly evolving high-technology era.<sup>22</sup> Although some critics have lingering concerns after the FTC issued its newest guides,<sup>23</sup> Part VI explains how the FTC is taking more assertive action to enforce fair advertising practices than simply issuing guides.<sup>24</sup> Part VII then discusses how other regulatory agencies are striving to ensure businesses comply with the 2013 guidance for online advertising disclosures.<sup>25</sup> Lastly, Part VIII explains why businesses and advertisers alike should ensure that advertisements comply with the FTC's standards in this continuously progressing technology-based society.<sup>26</sup>

## II. CELEBRITY SELLS

"Everybody lives by selling something," wrote Robert Louis Stevenson, author of *Treasure Island*.<sup>27</sup> Stevenson's statement is astute considering that today, an estimated \$50 billion is invested globally on corporate sponsorships and endorsements, with the majority of that amount being spent on "celebrity" endorsers.<sup>28</sup> Marketers, agents, and companies have always bought into the celebrity hype, because brands love profitable endorsement deals, and consumers buy into celebrities.<sup>29</sup> So what is the big deal? Celebrity endorsements have "the power to instigate and inspire, enlighten and enrage, entertain and edify the consumer."<sup>30</sup> Celebrity endorsements can cut through traditional advertising chaos and create a brand narrative that relates to multiple groups of consumers.<sup>31</sup> Ultimately, celebrity

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19. See *infra* Parts III, IV, VI, VII.

20. See *infra* Part II.

21. See *infra* Parts III, IV.

22. See *infra* Parts III, IV.

23. See *infra* Part V.

24. See *infra* Part VI.

25. See *infra* Part VII.

26. See *infra* Part V.

27. Dean Crutchfield, *Celebrity Endorsements Still Push Product: Why, in the Era of Social Media, the Rewards Continue to Outweigh the Risks*, ADVERTISING AGE (Sept. 22, 2010), <http://adage.com/article/cmo-strategy/marketing-celebrity-endorsements-push-product/146023/>.

28. *Id.*

29. *Id.* See also Feinman, *supra* note 3, at 110–11.

30. Crutchfield, *supra* note 27.

31. *Id.*

endorsements are always worth the investment if you pair the right brand with the right celebrity.<sup>32</sup> Indeed, the numbers make it clear that the right brand and celebrity pair can make the difference for companies.<sup>33</sup> Some brands have even seen up to a 20% increase in sales after commencing an endorsement deal.<sup>34</sup> Even more impressive is that some major companies have actually seen a bump in their stock value thanks to successful celebrity endorsements.<sup>35</sup>

Due to the changing landscape of advertising and advances in technology, companies and celebrities have been logging in online.<sup>36</sup> Social media has taken our world by storm;<sup>37</sup> Facebook averages 890 million users daily,<sup>38</sup> Instagram just recently hit 300 million monthly users,<sup>39</sup> and Twitter reported in 2014 that it has an average of 284 million monthly users.<sup>40</sup> Reports show that 95% of social media users believe a company should have a presence in social media.<sup>41</sup> With almost \$50 billion invested in corporate sponsorships and endorsements globally,<sup>42</sup> advertisers and companies alike have taken notice of these astronomical numbers.<sup>43</sup> Traditional endorsements are being morphed into different types of social and multi-media endorsements in an attempt to amplify the effect of celebrity advertising campaigns in today's technology-crazed landscape.<sup>44</sup> Advertisers and businesses have begun incorporating 21st century technology into celebrity-endorsement strategies "because social networks make up marketing's most powerful media:

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32. *Id.*

33. *But see* Kevin Harrington, *Save Your Money: Celebrity Endorsements Not Worth The Cost*, FORBES (Jan. 31, 2014, 3:31 PM), <http://www.forbes.com/sites/kevinharrington/2014/01/31/save-your-money-celebrity-endorsements-not-worth-the-cost/> (asserting that celebrity endorsements are not worth the costs, and if your product is strong, you do not need a celebrity to endorse it—it promotes itself).

34. Crutchfield, *supra* note 27. Percentages are based on the recent studies of hundreds of endorsements. *Id.*

35. *Id.* ("According to Anita Elberse, associate professor at Harvard Business School, some companies have seen their stock increase by .25% on the day the deal was announced.").

36. Feinman, *supra* note 3, at 110.

37. *Id.* at 111.

38. *Company Info*, FACEBOOK NEWSROOM, <https://newsroom.fb.com/company-info/> (last visited Feb. 20, 2014).

39. Kevin Systrom, *300 Million: Sharing Real Moments*, INSTAGRAM NEWS, <http://blog.instagram.com/post/104847837897/141210-300million> (last visited Dec. 15, 2014).

40. Press Release, Twitter, Twitter Reports Third Quarter 2014 Results (Oct. 27, 2014), <https://investor.twitterinc.com/releasedetail.cfm?ReleaseID=878170>.

41. Crutchfield, *supra* note 27.

42. *Id.*

43. Feinman, *supra* note 3, at 110.

44. *Id.*

recommendation.”<sup>45</sup> Social media has the potential to transform a traditional celebrity endorsement into a “multi-platform juggernaut.”<sup>46</sup>

A great example of a celebrity’s selling power is pop-icon Miley Cyrus. With over 50 million likes on her Facebook page,<sup>47</sup> 19.2 million followers on Twitter,<sup>48</sup> and 16.1 million followers on Instagram,<sup>49</sup> Cyrus is an attractive candidate for brands looking to grab a celebrity endorser. EOS lip balm seized the opportunity for an endorsement. As an EOS lip balm endorser, Cyrus posts on Twitter and Instagram about EOS lip balm, and even her music video for her song “We Can’t Stop” features the product.<sup>50</sup> Cyrus’ “We Can’t Stop” music video depicts a variety of flavors of the EOS lip balm and shows Cyrus applying the pink version. None of Cyrus’ EOS endorsements include even a hint of disclosure, which is probably part of the success.<sup>51</sup> While the advertisement in the music video conveys the message to consumers that Cyrus approves of EOS lip balm, there is no actual material statement being made about the product. Stealth marketers utilizing product placement rarely make explicit material statements or misstatements of fact; if the marketing deceives, it does so based on impressions the social media posting creates.<sup>52</sup>

The purpose of stealth marketing with product placement is not to defraud, but to bypass audience resistance to promotional messages by displaying a product to consumers without their awareness.<sup>53</sup> This type of stealth advertising product placement seems to work. For example, one Cyrus fan exclaimed, “Yes, I only bought this cause its[sic] in @MileyCyrus’s new music video #WeCantStop :) #eos.pic.twitter.com/KSwToasZrb.”<sup>54</sup> This fan’s comment seems to exemplify the effect of Miley Cyrus’ EOS endorsement, which is precisely the end result that businesses and advertisers seek.

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45. Crutchfield, *supra* note 27.

46. *Id.*

47. Miley Cyrus, FACEBOOK, <https://www.facebook.com/MileyCyrus> (last visited Feb. 4, 2015).

48. Miley Ray Cyrus, TWITTER, <https://twitter.com/mileycyrus> (last visited Feb. 4, 2015).

49. Miley Ray Cyrus, INSTAGRAM, <http://instagram.com/mileycyrus> (last visited Feb. 20, 2015).

50. See Miley Cyrus, *We Can’t Stop*, YOUTUBE (June 19, 2013), <http://www.youtube.com/watch?v=LrUvu1mlWco> [hereinafter *Cyrus Music Video*]. The EOS endorsement occurs between the 27th second and the 33rd second. *Id.*

51. William McGeeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1107 (2009); *Cyrus Music Video*, *supra* note 50.

52. Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 86 TEX. L. REV. 83, 109 (2011).

53. *Id.* at 110.

54. Source on file with author.

### III. BACKGROUND LAWS AND GUIDELINES

The majority of this comment focuses on the FTC's improved guidance for advertising and endorsement disclosures online, with a greater emphasis on social media platforms. For the purposes of this analysis, the relevant piece of law is the Federal Trade Commission Act ("FTC Act"), which governs trade and commerce.<sup>55</sup>

#### A. FTC Authority

In 1914, the FTC Act created the FTC to regulate competition and consumer protection.<sup>56</sup> Initially, the FTC was "empowered and directed to prevent persons, partnerships or corporations . . . from using unfair methods of competition."<sup>57</sup> However, the FTC also began efforts to outlaw misleading advertising. Therefore, Congress amended the FTC Act in 1938 to specify a prohibition against unfair and deceptive acts and practices in advertising.<sup>58</sup> According to the FTC, an advertisement or business practice is unfair if it causes or is likely to cause substantial consumer injury that consumers could not reasonably avoid, and is not outweighed by the benefit to consumers or competition.<sup>59</sup> Since then, the FTC has administered a wide variety of regulations to protect consumers from deceptive advertising practices including issuing guides to assist businesses in complying with regulations.<sup>60</sup>

As a general overview, the FTC's mission is to protect consumers from unfair and deceptive practices.<sup>61</sup> The FTC determines that a representation is deceptive if it is material and likely to mislead the reasonable consumer.<sup>62</sup> In most circumstances, the FTC uses a three-step process to make findings.<sup>63</sup> First, the FTC will determine whether the practice is likely to deceive consumers.<sup>64</sup> Second, the FTC will analyze the suspected deceptive practice from the position of a consumer acting reasonably

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55. 15 U.S.C. § 45 (2012).

56. *Id.* § 45(a)(2).

57. *Id.*

58. Feinman, *supra* note 3, at 118.

59. See Letter from the Fed. Trade Comm'n to Senators Wendell H. Ford & John C. Danforth (Dec. 17, 1980), *reprinted in* Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984).

60. See, e.g., FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. pt. 255 (2009); .COM DISCLOSURES, *supra* note 13; DOT COM DISCLOSURES, *supra* note 6.

61. See 15 U.S.C. § 45(a)(2).

62. See Letter from the Fed. Trade Comm'n to John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce (Oct. 14, 1983), *reprinted in* Cliffdale Assocs. Inc., 103 F.T.C. 110, 174 (1984).

63. See *id.*

64. *Id.*

within the circumstances.<sup>65</sup> Lastly, the FTC will determine if that practice is material and if consumer injury is likely—in that it is “likely to affect the consumer’s conduct or decision with regard to a product or service.”<sup>66</sup> Based on the FTC’s evaluations, injury exists if consumers would have made a different decision absent the deception.<sup>67</sup> In an effort to clarify some of the ambiguously broad laws regarding deceptive practices and to encourage voluntary compliance, the FTC has comprised a set of guides to illuminate its interpretation of the FTC Act. While guides have been issued as early as the 1970s, this comment focuses on the guides from 2000 until present, which provide direction for online advertisements and endorsements.<sup>68</sup>

#### *B. FTC Guidance for Online Endorsements Prior to 2013*

##### *1. What Constitutes an Endorsement?*

The FTC defines an endorsement as any advertising message that “consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser,” even if the views expressed by that party are identical to those of the sponsoring advertiser.<sup>69</sup> Advertising messages include verbal statements; demonstrations; depictions of the name, signature, likeness or other identifying personal characteristics of an individual; or the name or seal of an organization.<sup>70</sup> For instance, the 2009 *Guides Concerning the Use of Endorsements and Testimonials in Advertising* provides the following example: “A television advertisement for golf balls shows a prominent and well-recognized professional golfer hitting the golf balls. This would be an endorsement by the golfer even though he makes no verbal statement in the advertisement.”<sup>71</sup>

As media continues to expand, social networking sites like Facebook, Instagram, and Twitter are also forums that host endorsements.<sup>72</sup> For example, when well-recognized celebrity Kim Kardashian uploaded multiple photos with EOS lip balm, she was making an endorsement of the product to all of her Instagram and Twitter followers:

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65. *Id.* If the potentially deceptive practice is targeting a specific group of people, the FTC will instead evaluate based on the reasonableness of that consumer group—teenagers, for example—and not consumers generally. *Id.*

66. *Id.*

67. *Id.*

68. See 16 C.F.R. pt. 255 (2009); .COM DISCLOSURES, *supra* note 13; DOT COM DISCLOSURES, *supra* note 6.

69. 16 C.F.R. § 255.0(b) (2009).

70. *Id.*

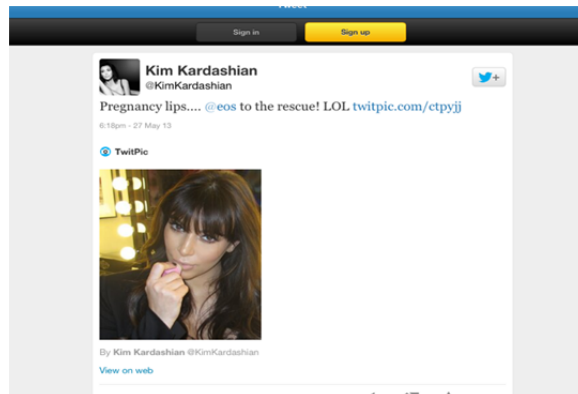
71. *Id.* § 255.0 ex.5.

72. .COM DISCLOSURES, *supra* note 13, at 15.



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## THE AGE OF THE HUMAN BILLBOARD



With more than 18.5 million followers on Twitter alone, Kardashian's endorsement reached not only EOS's target audience, but potentially all 18.5 million of Kardashian's followers.<sup>73</sup> Another example of a celebrity endorsement is Justin Bieber's tweet for 1-800-FLOWERS: "Everybody knows I love #MyMom! @1800flowers Mother's Day is on Sunday! Love your momma! Love u @pattiemallette."<sup>74</sup> The example from the 2009 FTC guide clarifies that an advertising message or endorsement encompasses more than a verbal or printed message from an endorser, and therefore the aforementioned tweets by Kardashian and Bieber constitute an endorsement that requires a disclosure.<sup>75</sup> However, while the 2009 guides helped to define what constitutes an endorsement, it failed to adequately address how to make disclosures on these new social media platforms.<sup>76</sup>

### 2. What Constitutes a Material Connection?

To combat new-age unfair advertising schemes, the FTC specified that material connections between a sponsor and endorser must be disclosed to the public.<sup>77</sup> The FTC defines a material connection as any connection between the endorser and sponsor of the advertised product or brand that "might materially affect the weight or credibility of the endorsement."<sup>78</sup> In its initial 2000 *Dot Com Disclosures*, the FTC explained that "[c]onnections between an endorser and the company that are unclear or unexpected to a customer also must be disclosed."<sup>79</sup> These connections

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73. Kim Kardashian, TWITTER (May 27, 2013), <http://twitpic.com/ctpyjj>.

74. Justin Bieber, TWITTER (May 9, 2013), <https://twitter.com/justinbieber/status/332472678835437569>.

75. 16 C.F.R. § 255.0(b) ex.5 (2009).

76. See *id.*; Feinman, *supra* note 3, at 127–37.

77. 16 C.F.R. § 255.5.

78. *Id.*

79. BUREAU OF CONSUMER PROTECTION BUS. CTR., FED. TRADE COMM'N, ADVERTISING AND MARKETING ON THE INTERNET: RULES OF THE ROAD (2000), available at <http://www.business.ftc.gov/documents/bus28->

warrant disclosure regardless of whether they have to do with a financial arrangement for a favorable endorsement, a position with the company, or stock ownership.<sup>80</sup> In short, when an endorser is compensated and it is not known to a substantial part of the viewing audience, the advertiser should disclose either the payment or promise of compensation in advance of and in exchange for the endorsement.<sup>81</sup> The FTC, based on its 2009 guides, requires that disclosures of material connections must be clearly and conspicuously stated; however, the FTC failed to address, or provide examples of, exactly how to make such disclosures.<sup>82</sup>

*C. Concerns with FTC Guidance Prior to the 2013 Guides*

A major concern of practitioners with the 2000 and 2009 guides is that the FTC did not provide examples of how to make “clear and conspicuous” disclosures on each specific medium when advertising in the online realm.<sup>83</sup> While practitioners have noted that the two guides are helpful because they acknowledge the application of the rules to online advertising, there were still growing concerns with the lack of specificity in the guides.<sup>84</sup> “Simply applying the old guides to new media fails to address the ever-changing reality of today’s consumer and her relationship with celebrities,” and the “‘clear and conspicuous’ standard is vague and difficult to apply across the myriad of channels through which advertisers transmit endorsed messages.”<sup>85</sup>

Practitioners pointed to three main concerns regarding the vague “clear and conspicuous” standard for endorsement disclosures.<sup>86</sup> First, the disclosure guidance does not adequately maintain the integrity of advertisements in non-traditional advertising forums (like Twitter and Instagram).<sup>87</sup> Second, disclosures that some advertisers have used in an attempt to comply with the vague guidance from the FTC’s 2009 guides still fall short of the standard, in that they are not sufficiently clear to inform consumers about the material connection between the endorser and sponsor.<sup>88</sup> Lastly, many advertisers have found ways to embed disclosure messages

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advertising-and-marketing-internet-rules-road [hereinafter RULES OF THE ROAD] (referencing necessary disclosures as explained in the 2000 DOT COM DISCLOSURES).

80. 16 C.F.R. § 255.5.

81. *Id.*

82. *Id.* See also Feinman, *supra* note 3, at 125 (“Section 255.5 defines the requirements for disclosing a material connection between advertisers and endorsers quite broadly, saying simply that the payment or compensation must be ‘clearly and conspicuously’ disclosed.”).

83. See generally Feinman, *supra* note 3, at 125–28.

84. See *id.*

85. *Id.* at 127. “The [2009] FTC Guides provide an insufficient standard for disclosure that is not appropriate for today’s advertising industry.” *Id.*

86. *Id.* at 127–28.

87. *Id.* at 127.

88. *Id.* at 128.

on these new, virtually unregulated, social media platforms so that they are not conspicuous enough.<sup>89</sup> These concerns were warranted because when the FTC issued its 2013 guide, it provided more specific examples of how to make clear and conspicuous disclosures on social media platforms.<sup>90</sup>

#### IV. 2013 GUIDELINES FOR NEW AGE SOCIAL MEDIA MARKETING

After growing concerns from practitioners regarding how to adequately determine what constitutes clear and conspicuous disclosures,<sup>91</sup> the FTC sought to clarify the clear and conspicuous requirement in its 2013 *.com Disclosures*.<sup>92</sup> In issuing the 2013 guides, the FTC announced that space-constrained advertisements (like those on Twitter) are not immune from FTC disclosure requirements.<sup>93</sup> The 2013 *.com Disclosures* reiterated the recommendation from the 2000 *Dot Com Disclosures*, which stated that advertisers should consider certain factors to determine whether a particular disclosure is clear and conspicuous.<sup>94</sup> Depending on the information that must be provided in any given disclosure, the nature of the advertisement, and the medium it is being viewed on, advertisers should consider a number of factors.<sup>95</sup>

While *.com Disclosures* focuses on all advertising mediums, it provides specific recommendations regarding disclosures for advertisements on social media platforms.<sup>96</sup> With a number of checkpoints for advertisers using the constrained ad space of online social media, the FTC addressed the lingering questions unanswered by the 2009 *Guides Concerning the Use of Endorsements and Testimonials in Advertising*.<sup>97</sup> “Many space-constrained ads displayed today are teasers. Because of their small size and/or short length, space-constrained ads, such as banner ads and

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89. *Id.*

90. *.COM DISCLOSURES*, *supra* note 13, at 15–17.

91. *See generally* Feinman, *supra* note 3, at 125–28.

92. *.COM DISCLOSURES*, *supra* note 13, at 4–21.

93. Jorge R. Arciniega, Elisabeth Morgan & Heather Egan Sussman, *FTC Updates Guidelines for Making Proper Disclosures in Digital Advertising*, MCDERMOTT WILL & EMERY (Apr. 22, 2013), <http://www.mwe.com/FTC-Updates-Guidelines-for-Making-Proper-Disclosures-in-Digital-Advertising-04-22-2013/>.

94. *.COM DISCLOSURES*, *supra* note 13, at 4–21; *DOT COM DISCLOSURES*, *supra* note 6, at 1–2.

95. *.COM DISCLOSURES*, *supra* note 13, at i–ii. Those factors include: the placement of the disclosure in the advertisement and its proximity to the claim it is qualifying; the prominence of the disclosure; whether the disclosure is unavoidable; the extent to which items in other parts of the advertisement might distract attention from the disclosure; whether the disclosure needs to be repeated several times in order to be effectively communicated, or because consumers may enter the site at different locations or travel through the site on paths that cause them to miss the disclosure; whether disclosures in audio messages are presented in an adequate volume and cadence and visual disclosures appear for a sufficient duration; and whether the language of the disclosure is understandable to the intended audience. *Id.* *See also* *DOT COM DISCLOSURES*, *supra* note 6, at 1–2.

96. *.COM DISCLOSURES*, *supra* note 13, at 15–17.

97. *Id.*

tweets, generally do not provide very much information.”<sup>98</sup> However, the FTC is not sympathetic to space constraints, and requires that disclosures of material connections must still be made in space-constrained advertisements.<sup>99</sup> Fortunately, the 2013 guides provided direction on how best to make disclosures of material connections on such platforms.

The primary clarification that the 2013 *.com Disclosers* guides do provide is that proximity and placement are not only important for traditional advertising disclosures, but they are even more crucial for an effective disclosure on a space-constrained social media platform.<sup>100</sup> For example, endorsements made on a celebrity’s social media site, Twitter for example, must have a disclosure that it is an advertisement or endorsement.<sup>101</sup> According to the FTC, a celebrity posting on his or her profile page, “I am an endorser of X company,” is not a sufficient disclosure.<sup>102</sup> Likewise, placing a disclosure where an individual would need to scroll in order to discover it is not a sufficient disclosure.<sup>103</sup> Additionally, hyperlinks<sup>104</sup> on a social media platform leading to a disclosure are generally insufficient.<sup>105</sup> The disclosure must occur within each endorsement post in order for it to not be considered deceptive.<sup>106</sup> For example, a tweet by comedian Michael Black in early May 2013 failed to disclose that he was a paid sponsor when he wrote: “I just turned myself into a Most Interesting Person with the new @DosEquis Legend of You app. Check it out on.fb.me/166xmC6.”<sup>107</sup> It was not until days later in the comments to Black’s tweet that Black disclosed that the original post was a paid advertisement.

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98. *Id.* at 15.

99. *Id.*; Press Release, Fed. Trade Comm’n, FTC Staff Revises Online Advertising Disclosure Guidelines: “Dot Com Disclosures” Guidance Updated to Address Current Online and Mobile Advertising Environment (Mar. 12, 2013), <http://www.ftc.gov/news-events/press-releases/2013/03/ftc-staff-revises-online-advertising-disclosure-guidelines> [hereinafter FTC Press Release Staff Revises “Dot Com Disclosures” Guidance].

100. *.COM DISCLOSURES*, *supra* note 13, at 8.

101. *Id.* at 15.

102. *Id.* at 16.

103. *Id.* at 9.

104. If a hyperlink is used, make sure to label the link to convey the importance, nature, and relevance of the information to which it leads. *Id.* at 11. Hyperlinks simply stating “more information” or “disclosure” are not likely to be effective, and thus not sufficient. *Id.* at 12. Furthermore, the hyperlink should be placed near the relevant information and be made noticeable. *Id.* at 13.

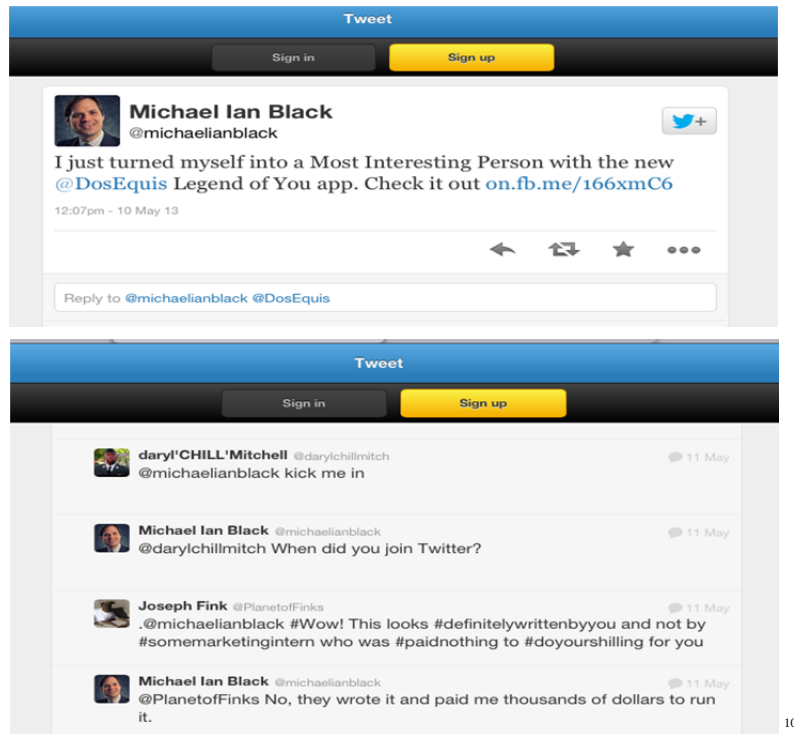
105. *Id.* at 10.

106. *Id.* at 16. *See also* Arciniega, Morgan & Sussman, *supra* note 93 (“Disclosures made in a space-constrained ad (e.g., a Tweet or SMS) should be placed in *each* message, in the *beginning* of the message, so the disclosure stays with the message if it is republished. Abbreviations that adequately inform consumers of the essence of a required disclosure may be used, however, the meaning of the abbreviation must be generally understood by consumers.”).

107. Michael Black, TWITTER (May 10, 2013), <https://twitter.com/michaelianblack/status/332935038566023169>.

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## THE AGE OF THE HUMAN BILLBOARD



According to the guides, this post is deceptive because the original advertising post did not disclose that it was a paid endorsement (i.e. that there was a material connection between Black and Dos Equis).<sup>109</sup> The fact that Black eventually disclosed the material connection, only after prompting, is still insufficient because consumers would have had to read through a full-day's worth of comments to find the delayed disclosure.<sup>110</sup> The 2013 *.com Disclosures* guide provides that for space constrained advertisements, it is sufficient to begin the post with: "Ad."<sup>111</sup> Accordingly, Black should have begun his original tweet with "Ad:" to indicate a disclosure of an endorsement agreement with Dos Equis and avoid liability for deceptive advertising.<sup>112</sup>

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108. Michael Black, TWITTER (May 10–11, 2013), <https://twitter.com/michaelianblack/status/332935038566023169>.

109. 16 C.F.R. § 255.5 (2009).

110. As explained in the new guides, if a consumer has to click or scroll through media to find a disclosure of material connections, the disclosure is not effective. *.COM DISCLOSURES*, *supra* note 13, at 15–16. *See also id.* at A–19.

111. *Id.* at A–18.

112. *Id.*

The 2013 guides have addressed many concerns practitioners raised after the 2009 guides with more specific examples of how to make adequate disclosures on social media platforms.<sup>113</sup> Still, some critics continue to be dissatisfied with the regulation conducted by the FTC; those concerns, however, are unfounded. This comment asserts that the FTC's enforcement has been appropriate and successful since issuing the updated 2013 guides.<sup>114</sup>

#### V. LINGERING CONCERNS POST-2013 GUIDES

A lingering concern with the 2013 FTC guidance on fair advertising practices is that it does not do enough to regulate or that its guidance is ineffective. The FTC Act's prohibition on "unfair or deceptive acts or practices" broadly encompasses advertising claims, marketing and promotional activities, and sales practices in general that occur online, in print, on television, over the telephone, and on radio.<sup>115</sup> The FTC issues either rules or guidelines for various industries.<sup>116</sup> A rule forbids certain acts or practices that the FTC has found to be deceptive or unfair to consumers.<sup>117</sup> Guides provide examples or direction on how to avoid unfair or deceptive acts or practices in an effort to help businesses comply with the law.<sup>118</sup> "Although guides do not have the force and effect of law, if a person or company fails to comply with a guide, the Commission might bring an enforcement action alleging unfair or deceptive practice in violation of the FTC Act."<sup>119</sup> Some practitioners are worried by the fact that guidance for advertising regulations in this online age is essentially comprised of only three guides. However, the FTC has been successful in regulating online advertising by providing businesses and other organizations check points and examples of how to comply with the FTC Act. Additionally, the overall effectiveness of the FTC actually encompasses its detailed guides for practitioners and businesses,<sup>120</sup> growing pressure from industry self-regulation,<sup>121</sup> and additional enforcement measures by the FTC against deceptive advertising on social media.<sup>122</sup>

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113. See *id.* at A-18, A-19, A-20; Feinman, *supra* note 3, at 139 (suggesting that the standard for disclosing endorsements in social media be the #ad and #spon hashtags); FTC Press Release Staff Revises "Dot Com Disclosures" Guidance, *supra* note 99.

114. See *infra* Parts IV, VI, VII.

115. .COM DISCLOSURES, *supra* note 13, at 2.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 2 n.5.

120. See, e.g., Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. pt. 255 (2009); .COM DISCLOSURES, *supra* note 13; DOT COM DISCLOSURES, *supra* note 6.

121. See *infra* Part VII.

122. See *infra* Part VI.

## VI. FTC TAKING ACTION

While critics believe that the FTC is not doing enough to regulate deceptive advertising practices in new media platforms, the FTC's actions are in fact sufficient to ensure consumers are protected from deceptive advertising in new media.<sup>123</sup> In addition to issuing guides, the FTC has increased efforts to make companies and advertisers realize it means business. Although the guides are recommendations on how to comply with the FTC Act, the FTC makes clear that non-compliance is unacceptable. Through Operation Full Disclosure<sup>124</sup> and recent enforcement actions,<sup>125</sup> the FTC is reminding businesses that deceptive advertising practices will not be allowed on any media platform, and it has taken back control of advertising regulations in the online era.

### A. Operation Full Disclosure

Operation Full Disclosure is the FTC's latest effort to ensure that advertisers and companies obey federal law and do not mislead consumers.<sup>126</sup> Operation Full Disclosure, which came out eighteen months after the updated 2013 guides, emphasized that the FTC's consumer protection laws apply to advertisements across all different types of media.<sup>127</sup> FTC blogger Lesley Fair asserted that the fact that disclosures must be clear and conspicuous to prevent an advertisement from being deceptive should not be surprising to any advertiser.<sup>128</sup> She explained that the standard certainly should not be news to the 60 or more companies, including 20 of the top 100 largest advertisers in the United States,<sup>129</sup> who received warning letters as part of the FTC's Operation Full Disclosure.<sup>130</sup>

The inadequate disclosures that appear in the reviewed advertisements (the identity of which were not disclosed by the FTC) fell into many different categories.<sup>131</sup> There were a number of identified deficiencies with the advertisements including that the advertisements were easy to miss, considered hard to read, contained fine print, or lacked disclosures essential to avoid misleading consumers,

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123. See *supra* Part V.

124. See *infra* Part VI.A.

125. See *infra* Part VI.B.

126. Lesley Fair, *Full Disclosures*, BUS. BLOG (Sept. 23, 2014, 10:32 AM), <http://business.ftc.gov/blog/2014/09/full-disclosure>; FTC Press Release Operation 'Full Disclosure', *supra* note 16.

127. FTC Press Release Operation 'Full Disclosure', *supra* note 16.

128. Fair, *supra* note 126.

129. *Id.*; FTC Press Release Operation 'Full Disclosure', *supra* note 16.

130. Fair, *supra* note 126.

131. See Fair, *supra* note 126; Deborah M. Lodge & Caroline H. Mead, *FTC launches "Operation Full Disclosure" in Advertising Review*, LEXOLOGY (Sept. 26, 2014), <http://www.lexology.com/library/detail.aspx?g=adcf306e-757e-4214-a7ca-c47b2aa98e3b>; FTC Press Release Operation 'Full Disclosure', *supra* note 16.

such as material connections.<sup>132</sup> For those advertisers who have harped on the lack of specifics, like required font and size for disclosures, the FTC countered by asking advertisers if they really wanted the FTC staff to dictate the specifics of their advertising campaigns.<sup>133</sup> The FTC reminded advertisers and businesses that aside from some specific rules that mandate detailed disclosure standards, it is up to the advertisers to conform their advertisements to appropriately meet the clear and conspicuous standard.<sup>134</sup> The FTC believes it would be a mistake to impose a one-size-fits-all approach.<sup>135</sup> Fair explained, “[a]s long as consumers looking at the ad come away with an accurate understanding, companies have a substantial leeway in how they communicate their marketing message.”<sup>136</sup> This flexibility allows advertisers and businesses continued creativity and ingenuity in their advertising campaigns.<sup>137</sup>

The FTC reminded companies that even though they may not have received a warning letter during Operation Full Disclosure that does not necessarily mean all of their business’s disclosure practices are adequate. “Savvy marketers will take Operation Full Disclosure as an opportunity for a refresher on the ‘clear and conspicuous’ standard,” and if their advertising practices fall short, make revisions.<sup>138</sup> Prominent law firms across the nation have echoed these same recommendations since the newest pronouncement of the guides,<sup>139</sup> and some even predicted additional enforcement actions following the Operation Full Disclosure

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132. See Fair, *supra* note 126; Lodge & Mead, *supra* note 131; FTC Press Release Operation ‘Full Disclosure’, *supra* note 16.

133. Fair, *supra* note 126.

134. See *id.* (stating that “the ‘clear and conspicuous’ ball is in the advertiser’s court”); FTC Press Release Operation ‘Full Disclosure’, *supra* note 16.

135. Fair, *supra* note 126.

136. *Id.*

137. *Id.* (“The ‘clear and conspicuous’ standard allows advertisers to use their limitless creativity to integrate important information into the overall campaign.”).

138. *Id.* See also Mark Brennan & Timothy Tobin, *FTC Sends Dozen of Warning Letters to Companies Over Advertising Disclosures*, CHRONICLE OF DATA PROTECTION (Nov. 12, 2014), <http://www.hldataprotection.com/2014/11/articles/consumer-privacy/ftc-sends-dozens-of-warning-letters-to-companies-over-advertising-disclosure/>.

139. See, e.g., Brennan & Tobin, *supra* note 138 (“The warnings serve as a reminder that organizations should review their disclaimers and disclosures to ensure compliance with ‘clear and conspicuous’ disclosure standards and seek guidance where appropriate.”); David F. McDowell, D. Reed Freeman, Jr., & Aramide O. Fields, *FTC Warns Advertisers to Check the Fine Print in “Operation Full Disclosure”; Shot Across the Bow Could Signal Law Enforcement Actions to Come*, MORRISON & FOERSTER CLIENT ALERT (Sept. 26, 2014), <http://www.mof.com/~media/Files/ClientAlert/2014/09/140926FTCOperationFullDisclosure.pdf> (“In light of the FTC’s recent warnings, advertisers would be well-advised to review their ads and disclosures anew to make sure they comply with the FTC’s standards for clear and conspicuous disclosures in . . . online advertising.”).



warning letters.<sup>140</sup> Inevitably, companies and marketers should immediately review internal disclosure practices before the FTC takes stiffer action.

*B. Enforcement Actions*

Practitioner's predictions were correct; shortly after Operation Full Disclosure was announced, the FTC brought an enforcement action against two prominent companies, Deutsch LA, Inc. and Sony.<sup>141</sup> The alleged fraudulent advertising practices of Deutsch LA and Sony involve endorsements posted by social media users missing necessary disclosures.<sup>142</sup> This is yet another action taken by the FTC to signal to companies that advertisement through social media must still comply with Section V's disclosure requirements.<sup>143</sup> In light of the 2009 Endorsement Guides, the updated 2013 *.com Disclosure* guide, and most recently, Operation Full Disclosure, the FTC's enforcement action against Deutsch LA and Sony is not surprising.<sup>144</sup> While the FTC has brought actions based on deceptive advertising before,<sup>145</sup> this appears to be the first action taken by the FTC against deceptive endorsements on social media.<sup>146</sup>

The complaint alleged against Deutsch LA asserted that the advertising company failed to disclose material connections when it represented its then-client, Sony, during the advertising promotions for the PlayStation Vita handheld gaming console.<sup>147</sup> While the crux of the complaint for both companies was related to deceptive advertising of the gaming console's capabilities, it also included a count relating to the Deutsch LA's use of Twitter to promote Sony's gaming console.<sup>148</sup> Specifically, the complaint alleged that Deutsch LA's employees responded to an email from assistant account executives that requested employees to assist in the

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140. McDowell, Freeman & Fields, *supra* note 139 ("We expect the FTC may well follow this group of warning letters with a series of enforcement actions, as it did in 1996 against a number of auto manufactures for the mouse print in their leasing ads.").

141. FTC Press Release Sony, *supra* note 17.

142. Julie O'Neill & Adam Fleisher, *FTC Enforcement Action Confirms That Ad Disclosure Obligations Extend to Endorsements Made in Social Media*, SOCIALLY AWARE BLOG (Dec. 3, 2014), <http://www.sociallyaware blog.com/2014/12/03/ftc-enforcement-action-confirms-that-ad-disclosure-obligations-extend-to-endorsements-made-in-social-media/>; FTC Press Release Sony, *supra* note 17.

143. O'Neill & Fleisher, *supra* note 142.

144. *Id.* "The Endorsement Guides establish that the failure to disclose a material connection is deceptive, and Dot Com Disclosures affirm that the FTC's rules on necessary disclosures apply to any message, whatever the medium, and expressly including even 'space constrained ads,' such as tweets." *Id.*

145. *Id.*

146. *Id.*

147. O'Neill & Fleisher, *supra* note 142; FTC Press Release Sony, *supra* note 17.

148. O'Neill & Fleisher, *supra* note 142; FTC Press Release Sony, *supra* note 17.

marketing of the new Sony product.<sup>149</sup> The employees were directed to use their personal social media accounts to post positive feedback about the Sony gaming

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149. Complaint at 4–5, *In the Matter of Deutsch LA, Inc.*, No. 122-3252 (F.T.C. 2014) [hereinafter Complaint]. The following is the excerpt from the complaint in *In the Matter of Deutsch LA, Inc.* regarding the failure to disclose of a material connect in the advertising campaign. The Federal Trade Commission alleges:

10. Through the means described in Paragraph 5, Respondent [Deutsch LA, Inc.] included the term “#gamechanger” in advertisements for the PS Vita. This term directed consumers to online conversations about the PS Vita on Twitter.

11. Approximately one month before SCEA offered the PS Vita for sale to the public, one of Respondent’s assistant account executives sent the following email message to all of Respondent’s employees:

“Fellow Deutschers –

The PlayStation Team has been working hard on a campaign to launch Sony’s all-new handheld gaming device, the PS Vita, and we want YOU to help us kick things off!

The PS Vita’s innovative features like 3G gaming, cross platform play and augmented reality will revolutionize the way people game. To generate buzz around the launch of the device, the PS Vita ad campaign will incorporate a #GAMECHANGER hashtag into nearly all creative executions. #GAMECHANGER will drive gamers to Twitter where they can learn more about the PS Vita and join in the conversation. The campaign starts on February 13th, and to get the conversation started, we’re asking YOU to Tweet about the PlayStation Vita using the #GAMECHANGER hashtag. Easy, right? <https://twitter.com/#!/search/%23gamechanger>

Want to know more about what makes the PS Vita a #GAMECHANGER? Check out the links below:

<http://us.playstation.com/psvita/>

[http://www.youtube.com/watch?v=Q8C5quD0a\\_0](http://www.youtube.com/watch?v=Q8C5quD0a_0)

Thanks for your help, and make sure to go get a PlayStation Vita on February 22nd!”

12. As a result of this email message, various Deutsch employees used their personal Twitter accounts to post positive comments about the PS Vita, including the following examples:

“One thing can be said about PlayStation Vita... it’s a #gamechanger” “PS Vita [ruling] the world. Learn about it!

[us.playstation.com/psvita/#GAMECHANGER](http://us.playstation.com/psvita/#GAMECHANGER)”

“Thumbs UP #GAMECHANGER - check out the new PlayStation Vita”

“This is sick. . . See the new PS Vita in action. The gaming #GameChanger”

“Got the chance to get my hands on a PS Vita and I’m amazed how great the graphics are. It’s definitely a #gamechanger!”

console using the specific hashtag, “#gamechanger.”<sup>150</sup> These posts were deceptive because the employees did not disclose their material connection to Deutsch LA or its client, Sony.<sup>151</sup> According to the FTC, the material connection would have been important to consumers when making decisions about whether or not to purchase the Vita handheld gaming console.<sup>152</sup> On this count, the settlement order barred Deutsch LA from these practices in the future.<sup>153</sup> This action by the FTC reaffirms that any posting to social media must clearly and conspicuously disclose all material connections between employees, advertising agencies, and the agencies’ clients.<sup>154</sup> Companies continuing to deceive consumers by omitting disclosures of material connections could ultimately face enforcement action by the FTC.

#### VII. INDUSTRY SELF-REGULATION: OTHERS ARE STEPPING UP

Native advertising, another form of stealth advertising, is advertising content designed to blend in with editorial content.<sup>155</sup> Forms of native advertising vary widely and are growing quickly, but they are a fairly recent phenomenon.<sup>156</sup> However, publishers and advertisers engaging in native advertising are still figuring

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13. Through the means described in Paragraphs 10 through 12, Respondent has represented, directly or indirectly, expressly or by implication, that these comments about the PS Vita were independent comments reflecting the views of ordinary consumers who had used the PS Vita.

14. In truth and in fact, these comments about the PS Vita were not independent comments reflecting the views of ordinary consumers who had used the PS Vita. These comments were created by employees of Respondent, an advertising agency hired to promote the PS Vita. Therefore, the representation set forth in Paragraph 13 was, and is, false and misleading.

15. Through the means described in Paragraphs 10 through 12, Respondent has represented, directly or indirectly, expressly or by implication, that certain comments about the PS Vita reflected endorsements from persons who had used the PS Vita. Respondent failed to disclose that those comments were written by employees of Respondent, an advertising agency hired to promote the PS Vita. This fact would have been material to consumers in their purchasing decision regarding the PS Vita. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

16. The acts and practices of Respondent as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

150. Complaint, *supra* note 149, at 4–5.

151. *Id.*; FTC Press Release Sony, *supra* note 17 (“The FTC also alleges that Deutsch LA further misled consumers by urging its employees to create awareness and excitement about the PS Vita on Twitter, without instructing employee to disclose their connection to the advertising agency or its then-client Sony.”).

152. Complaint, *supra* note 149, at 5.

153. O’Neill & Fleisher, *supra* note 142; FTC Press Release Sony, *supra* note 17.

154. See Complaint, *supra* note 149; O’Neill & Fleisher, *supra* note 142; FTC Press Release Sony, *supra* note 17.

155. Marshall, *supra* note 15.

156. *Id.*

out how to use disclosures without openly repulsing consumers.<sup>157</sup> Since the FTC's 2013 *.com Disclosures* guide, the debate about disclosures in the industry has evolved.<sup>158</sup>

*When native advertising first appeared many [companies] thought about whether disclosure was necessary or not. I think everyone recognizes now the answer is 'yes', but the debate has shifted to how that disclosure actually needs to be made,' said Linda Goldstein, advertising lawyer and partner at law firm Manatt, Phelps & Phillips.*<sup>159</sup>

Despite the ongoing debate within the industry, there are companies taking it upon themselves to stay in compliance with the FTC's updated 2013 guide.<sup>160</sup> Some publishers, like Quartz, are even taking it a step further and providing readers with specific details about who creates its sponsored content.<sup>161</sup> Jay Lauf, the president and publisher of Quartz, stated, "I do think ensuring you're in no way trying to fool a reader is critical, and we've found the clearer labeling [sic] on the content the better it performs."<sup>162</sup>

But even if companies are not exactly overhauling disclosure practices of their own accord, other regulatory bodies are stepping in to ensure compliance with the new guides.<sup>163</sup> The National Advertising Division ("NAD"), an investigative unit of the advertising industry's system of self-regulation and administered by the Council of Better Business Bureaus, is one of the more prominent associations that has stepped in to assist the FTC in clarifying its regulations.<sup>164</sup> The NAD has made recommendations to companies to ensure that their online labeling and disclosures adequately comply with the new FTC guidance.<sup>165</sup> For example, the NAD recommended that the company Taboola make its disclosures larger and clearer to

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157. *Id.* ("Taboola and Outbrain, for instance, place paid links on publishers' pages. Twitter sells 'promoted tweets' that slip into users' feeds. Other publishers, including The Wall Street Journal, publish sponsored articles that relate to the products, services, or interests of advertisers.").

158. *Id.*

159. *Id.*

160. *Id.* (explaining how BuzzFeed planned to overhaul the way it disclosed sponsored content to consumers following the FTC's 2013 guides). *But see id.* ("According to Outbrain, it's up to its publisher clients to decide whether to disclose sponsored links or not.").

161. *Id.*

162. *Id.*

163. *Id.*; *see generally* Press Release, Advertising Self-Regulatory Council, NAD Reviews Taboola's Native Ad Widget, Recommends Clearer Disclosures (May 20, 2014), <http://www.asrcreviews.org/2014/05/nad-reviews-taboolas-native-ad-widget-recommends-clearer-disclosures/> [hereinafter ASRC Press Release].

164. ASRC Press Release, *supra* note 163.

165. *Id.*; Marshall, *supra* note 15.

comply with the FTC's updated guides.<sup>166</sup> In its recommendation, the NAD asserted that the FTC's guidance to online advertisers encouraged the consideration of "several factors to ensure that any labels and visual cues used are sufficiently noticeable and understandable to consumers."<sup>167</sup> While Taboola stated that its current disclosure methods do more to highlight paid placements for consumers than most competitors, it welcomed the NAD's recommendations and expressed that it would make the necessary modifications to its disclosures.<sup>168</sup> Taboola, in its advertiser's statement, also said it appreciated "NAD's interest in ensuring that the disclosures be clear and conspicuous to readers,"<sup>169</sup> and its CEO, Adam Singolda, hopes that other companies will take strides to make their paid links clearer.<sup>170</sup> Thus, companies and advertisers are already conforming to the FTC's guidelines either through the companies' internal initiatives or continued industry pressure not to deceive consumers.

#### VIII. SHOULD BUSINESSES WORRY?

While it is true that the FTC advertising and disclosure guides do not have the force and effect of law, non-compliance by advertisers or businesses may lead to enforcement actions brought by the FTC alleging unfair or deceptive practice in violation of the FTC Act. There is an underlying legal duty for businesses not to engage in deceptive advertising; the guidelines are a non-binding attempt to articulate rules of conduct that will keep businesses from deceptive advertising. But the duty to comply rests fully with the businesses and not with the FTC. Ultimately though, businesses should be concerned about their advertising practices, since the FTC periodically joins with other law enforcement agencies to monitor the Internet for potentially false or deceptive online advertising claims.<sup>171</sup> While a disclosure may take away from a business' intended image in advertising campaigns, it would be in a business' best interest to conform to FTC standards. Those who do not could face enforcement actions that include: cease and desist orders, fines up to \$16,000 per violation, injunctions, and, in some instances, refunds to consumers for actual damages in civil lawsuits.<sup>172</sup>

Although the various guides are not clear about which party is liable where an advertising disclosure is omitted, it appears that the advertiser bears the bigger

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166. ASRC Press Release, *supra* note 163; Marshall, *supra* note 15.

167. ASRC Press Release, *supra* note 163.

168. *Id.*; Marshall, *supra* note 15.

169. ASRC Press Release, *supra* note 163.

170. Marshall, *supra* note 15.

171. RULES OF THE ROAD, *supra* note 70.

172. *Id.*

burden.<sup>173</sup> Companies should modify practices to ensure that celebrity endorsers are advised on the imperativeness of disclosures in all social media endorsements to safeguard from potential liability.<sup>174</sup> For example, Hogan Lovells advised that it “should be standard practice for companies to review the transparency of material disclaimers and disclosures in their advertising before every ad campaign.”<sup>175</sup> Furthermore, many practitioners anticipated that after Operation Full Disclosure was launched, the FTC would follow with enforcement actions.<sup>176</sup> Operation Full Disclosure is the latest indicator that companies should be concerned, because it “serve[s] as a reminder that organizations should review their disclaimers and disclosures to ensure compliance with ‘clear and conspicuous’ disclosure standards and seek guidance where appropriate.”<sup>177</sup> In light of Operation Full Disclosure and the enforcement actions taken against Sony and Deutsch LA, advertisers and companies should review and revise their advertising disclosure practices. “If the brand does not require the user to disclose—clearly and conspicuously and in each picture, tweet, or other post—that he or she has a material connection to the company, then both the company and the user run the risk of being subject to a charge of deception.”<sup>178</sup> Consequently, businesses that hire advertising agencies should also make sure that the agencies’ practices and policies are current and compliant with the FTC’s most recent guidance.

## IX. CONCLUSION

Since its inception in 1914, the FTC has enforced the law of unfair advertising to protect consumers from unjust business practices.<sup>179</sup> New media has brought challenges in regulating advertising in the sphere of consumer protection.<sup>180</sup> Despite the changing climate of advertising, however, the FTC has prudently taken strides

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173. .COM DISCLOSURES, *supra* note 13, at 5 (asserting that advertisers are responsible for making sure that all necessary disclosures to consumers are made); Alston & Bird LLP, *The FTC’s New Guidance for Digital Advertising*, INTELL. PROP. ADVISORY (Mar. 26, 2013), <http://www.alston.com/Files/Publication/913e5596-c77a-41e5-bfd4-ef2396fa5390/Presentation/PublicationAttachment/5a0fa202-5e18-42fe-8b90-efba4b51d033/13-243-FTC-New-Guidance-Digital-Advertising.pdf> (“Importantly, the burden is on the advertiser—not the platform where the advertisement will be shown (e.g., Facebook)—to design the advertisement and any necessary disclosures to fit the platform. If the disclosure cannot be made clearly or conspicuously on the device or platform, and the ad is incomplete or deceptive without it, then the advertisement should not run on that particular device or platform.”).

174. Arciniega, Morgan & Sussman, *supra* note 93 (“Companies may be held liable for misleading statements made by third-party endorsers, so the best practice is to employ quality control processes to ensure the guidelines in the .com Disclosures are followed.”).

175. Brennan & Tobin, *supra* note 138.

176. McDowell, Freeman & Fields, *supra* note 139.

177. Brennan & Tobin, *supra* note 138.

178. O’Neill & Fleisher, *supra* note 142.

179. See 15 U.S.C. §§ 41–58 (2012); *supra* Part III.

180. See DOT COM DISCLOSURES, *supra* note 6, at 1; *supra* Part II.

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to provide guidance to businesses and advertisers about how to comply with the FTC Act.<sup>181</sup> While some criticize the FTC's effectiveness, the FTC has continued to regulate advertising practices in order to protect consumers in this quickly developing technological age.<sup>182</sup> Furthermore, it has provided advice to companies through its guides<sup>183</sup> while not completely chilling the imagination and creativity in advertisement visions.<sup>184</sup> The FTC continues to assert itself as an effective regulatory agency with the help from other agencies,<sup>185</sup> Operation Full Disclosure,<sup>186</sup> and new enforcement actions spurred from social media advertising.<sup>187</sup> Consequently, businesses and advertisers alike should take care to maintain compliance with the FTC updates in this progressing, technology-based society.<sup>188</sup>

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181. See *supra* Parts III, IV.

182. See *supra* Parts III, IV.

183. See *supra* Parts III.B, IV.

184. See Fair, *supra* note 126.

185. See *supra* Part VII.

186. See *supra* Part VI.A.

187. See *supra* Part VI.B.

188. See *supra* Part VIII.